Supreme Court of the United States

October Term, 1975
No. 74-1577

ELMER BIAS and LEON BIAS,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

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Supreme Court of the United States

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ELMER BIAS and LEON BIAS,
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vs.

STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Elmer Bias and Leon Bias, pray that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on March 28, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The opinion and journal entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is attached hereto as Appendix "A", *infra,* at page A1. The judgment entries of the Supreme Court of Ohio denying further appellate review are Appendices "B" and "C", *infra* at pages A3 and A4. The journal entires of the Common Pleas Court (the trial court) are Appendix "D" and "E", *infra,* at pages A5 and A7.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 28, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTION INVOLVED

1. Does the Fourth Amendment's protection against unreasonable searches and seizures apply where police officers enter a business establishment without a warrant to arrest or search, and thereafter search a restroom located in the basement portion of the said business establishment, without said warrants and in the absence of exigent circumstances?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ohio Revised Code Section 2905.01(A)(4):

> No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following reasons: To engage in sexual activity, as defined in Section 2907.01 of the Revised Code, with the victim against his will.

STATEMENT OF THE CASE

Leon Bias and Elmer Bias, the petitioners herein, were convicted in Case No. 88886, for the crime of rape.

Following their convictions, petitioners were sentenced to the Ohio Penitentiary. The appeal on questions of law from the judgment entered on those verdicts, resulted in affirmance by the Court of Appeals. The Supreme Court of Ohio denied leave to appeal. This action is a result of the judgment of the Ohio Court of Appeals.

STATEMENT OF FACTS AND EVIDENCE

On December 24, 1967, the defendant, Leon Bias, was arrested at his brother Herbert's shoe shine parlor after a warrantless search of the basement of that premises by six police officers. As a result of that search, photographs were taken and certain articles were seized. Prior to the search and seizure, the defendant was never informed of his right to an attorney. Leon Bias' brother, Elmer Bias, was later arrested and tried as a co-defendant.

At the first trial in February, 1969, the jury was discharged after being unable to reach a verdict (R. 4). At the second trial in May, 1969, the trial court overruled the motion of the petitioners to suppress the evidence seized as a result of the search of the basement.

At the petitioners' trial, the evidence indicated that Detective Donald Ferris, who first investigated the alleged rape, went to the shoe shine parlor and found it closed (R. 53). He wanted to see the basement to complete his investigation and to corroborate the complainant's testimony. According to Detective Ferris' testimony, he couldn't know whether anything was in the basement until he looked at it (R. 54):

"Q. The reason you went to the shoe shop first is because you wanted to see the basement, didn't you?

A. Yes.

Q. You wanted to complete your investigation, didn't you?

A. Yes.

Q. And in order to corroborate her testimony to you, you would have to see the basement, wouldn't you?

A. Yes.

Q. Because, Officer, maybe nothing was in the basement, it could have happened, because you didn't know, did you?

A. No.

Q. You didn't know until you could have seen the basement, could you?

A. Right." (R. 53, 54)

The assignment had been received at 11:32 P.M. on December 23, 1967; the second visit to the store occurred approximately eight or ten hours later (R. 21). During that period of time, no search warrant was applied for or obtained, the thin excuse being given that December 24, 1967, was a Sunday, and the following day was Christmas (R. 25, 26).

On the morning of the search, Leon Bias was working in his brother's shoe shine parlor. At approximately 10:00 A.M., four police officers—two detectives and two uniformed police officers—entered the store, approached the defendant, questioned him as to his identity, and as to whether he knew a girl named Betty Forrester (R. 60, 10, 11, 36, 37). According to the testimony of Detective Ralph Howard, he told the petitioner Leon Bias that a complaint had been made, and that the complainant had alleged that a crime had occurred in the basement of the store (R. 12).

The police officers were without a search warrant. Detective Howard, after asking if he could look in the basement, told the petitioner Leon Bias that he didn't have to let them go down there, but that they'd be back with a search warrant (R. 12, 13). At no time prior to the search and his subsequent arrest was the petitioner Leon Bias informed of his right to counsel (R. 13, 14), even though Detective Howard claimed that the intention of the police was to arrest the petitioner Leon Bias no matter if the

basement had not conformed to the complainant's description (R. 19, 21).

In response to the detective's request to search, the petitioner Leon Bias, obeying the authority of the four law officers, told the officers to go ahead. As Detective Howard testified, ". . . he didn't talk much at all, very quiet, he responded practically only to when we asked him something, that is when he responded." (R. 35). Complying with the request, the defendant turned on the basement light, showed the police officers the way downstairs, escorted them down into the basement, and then returned upstairs alone (R. 14, 24). As the defendant testified, "They said they wanted to see the basement, and I gave them my respect and let them see it." (R. 42).

Detective Howard telephoned for the Scientific Identification Unit to come to the store with a camera to take pictures. Detective Stanley Marvin and his partner, Detective Ashcroft, responded to the call (R. 15, 55, 58). The two SIU men proceeded to the basement and conducted their investigation (R. 56).

Detective Howard testified that they arrived at the premises at approximately 10:00 A.M. (R. 10). Detective Marvin testified that he and his partner arrived at the store at approximately 11:15 A.M. with their photographic, fingerprint, and other investigative equipment (R. 56). Thus, it can be readily ascertained that this search of unlimited scope, conducted both without a warrant and without the petitioner's presence, extended not only throughout the entire basement, but throughout a timespan of well over one and one-quarter hours as well.

> "Q. And while you were down in the basement he was upstairs, isn't that right?
>
> A. Yes." (R. 27)

In the meantime, Detective Howard and the other police officers, never having informed the petitioner as to exactly what articles they were looking for, searched the basement. As a result of the undefined search, they seized two pairs of lady's stockings, three or four rubber prophylactic wrappers, a white sheet, a red apron, and a portion of electric wire cord (R. 16, 17). They did not give the defendant, Leon Bias, a receipt for these items (R. 16). Significantly, it was only after the detectives found the basement to be the way the complainant had described it, and after they had seized the above items and had taken the photographs, that they went back upstairs and informed the defendant that he was under arrest:

> "Q. When did you arrest the defendant?
>
> A. When we found that the pictures, or excuse me, when we found that the basement was as our victim had described it, and the evidence that indicated the crime had occurred, as she had related it to us, and upon—
>
> Q. So you—
>
> A. Upon completion, when the SIU, when the photograph men got there, took their pictures, we then went up and told him we had to take him with us.
>
> Q. So you arrested him after you took the pictures and got all your evidence, is that correct?
>
> A. Yes." (R. 16)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Preliminary Statement

In its slip opinion of February 25, 1971, the Ohio Court of Appeals upheld petitioners' position with respect to those points argued before it but found that:

> Nevertheless, the evidence secured in this case is not suppressible because the record shows that it was lying in plain view of anyone proceeding to the public restroom area in the defendant's business establishment. A policeman does not need a search warrant for evidence which is in plain view. A policeman is not foreclosed from entry into a public area simply because he is a policeman and no warrant is necessary for such entry.

It is now petitioners' position that (1) while the shop itself was open for business, only those portions of the premises used for the specific business of shining shoes were open to the public; (2) the basement area was not noticeably open to public use and traffic, but entrance thereto required the discriminating permission of the owner or his delegate; and (3) as such, it was not generally open to all but only to whomever the premise holder selected, and, absent that permission, the area was considered to be private; and (4) the Ohio Court of Appeals decided a constitutional question not in accordance with applicable decisions of this Honorable Court.

I

Where police officers enter a business establishment without a warrant to arrest or search, and thereafter search a restroom located in the basement portion of the said business establishment, without said warrants and in the absence of exigent circumstances such a search is in violation of the Fourth Amendment of the Constitution of the United States and all evidence seized therefrom must be suppressed.

It is clear from the record below that, at the time that Detective Ralph Howard and the other officers of the Cleveland Police Department arrived at the defendants' place of business, it was open for business (R. 10-11, 214). This fact alone, however, does not mean that those on the premises are denied the protection of the Fourth Amendment nor does it mean that those premises may be searched indiscriminately.

> The business man, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. *See v. Seattle*, 387 U.S. 541, 543 (1967).

As stated by the Court in *United States v. Raidl*, 250 F. Supp. 280 (N.D. Ohio 1965):

> We do not think however, that the mere fact that the store was open for business is sufficient to open the door to deprivation of an otherwise inviolate constitutional right. It is true, as the Government contends, that the agents could have been on the premises as business invitees of the petitioner. But an invitation to do business is not equivalent to an invitation to ignore the petitioner's Fourth Amendment

rights. Therefore we cannot accept the Government's contention that they needed no warrant to search the petitioner's place of business.

In *Raidl* the Court held that the Government could not, without benefit of a search warrant, enter into the defendant's gun shop and encroach upon areas considered by the defendant to be off-limits to his customers.

Similarly in *State v. LaDuca*, 214 A.2d 423 (N.J. Sup. Ct. 1965), the Court was confronted by the[1] warrantless search of a barber shop and persons therein. The State contended that the search and subsequent seizure of some betting slips "took place on the premises of the barber shop which is a public place. . ." (page 423) and, therefore, not subject to Fourth Amendment protection. The Court stated preliminarily:

> It has never been held that a place of business of a private person or concern open to the public for purposes of doing business is beyond the protection of the Fourth Amendment, although the nature of a place of business as open to the public clearly is a factor in adjudging the reasonableness of an entry thereon by police officers. Private places of business, although open to such members of the public as had business with the owners, have repeatedly been held, or have been assumed without argument to the contrary, to be within the protection of the Fourth Amendment... (p. 425)

1. The officers in the case had obtained a warrant which was so patently invalid that the State did not even urge its propriety. *LaDuca* turned upon whether the barber shop was so public as to be without the protection of the Fourth Amendment and whether the defendants were subjected to search incident to valid arrest.

and acknowledged:

> . . . that a private business whose doors are open to the general public is also to be considered open to entry by the police for any proper purpose not violative of the owner's constitutional rights—e.g., patronizing the place or surveying it to promote law and order or to suppress a breach of the peace . . . (p. 426)

but held that:

> Without a valid warrant, without any arrest of anyone, and without the prior observation of the commission of any crime therein, the police took the entirely illegal action of, in effect, seizing possession of the defendant's barber shop... (p. 426)

The Court reversed the defendants' conviction below stating that evidence so obtained from the barber shop and those people therein was illegal and suppressible.

The principle to be gleaned is two-pronged: inviting pedestrian traffic to a portion of premises does not divest the entire building of Fourth Amendment protection; similarly, an area may be an island surrounded by a public area, yet the owner's expectation of privacy can protect it from intrusion.[2]

2. Cf. also: protection granted to a locker in a bowling alley (*People v. Baker*, 90 Cal. Rptr. 508 (Cal. App. 1970)), a locker in a bus station (*United States v. Small*, 297 F. Supp. 582 (D.C. Mass. 1969)), the private office of a gasoline filling station (*People v. Grossman*, 257 N.Y.S.2d 266 (N.Y. Sup. Ct. 1965)), a commercial building (*United States v. Rosenberg*, 416 F.2d 680 (7th Cir. 1969)), an industrial complex (*People v. Ramsey*, 77 Cal. Rptr. 249 (Cal. App. 1969)), and an art studio (*Laverne v. Corning*, 316 F. Supp. 629 (S.D. N.Y. 1970)). In short, the Fourth Amendment encompasses whatever a person seeks to preserve as private. *United States v. McCarthy*, 292 F. Supp. 937 (S.D. N.Y. 1968).

The expectation of privacy—or lack of it—is the crux of the question. For example, in *State v. Dias*, 470 P.2d 510 (Hawaii Sup. Ct. 1970), the defendants were arrested in a passageway between two buildings; a search of this area produced evidence which resulted in their convictions for drug offenses. The Supreme Court of Hawaii reversed:

> The group of people stood between the two apartment buildings in the common passageway which was private property, although not theirs. While the space between the apartments was open to the plain view of the officer, it was not open to unlimited governmental intrusions such as the search which ensued.

The Court, after explaining that its decision was compelled by *Katz v. United States*, 389 U.S. 347 (1967) held that:

> Accordingly, the test is not whether the members of the group in the passageway were technically "trespassers," "licensees," or "invitees." It is one of reasonable expectations of privacy. Every individual has expectations of privacy with regard to his person wherever he may go, be it a public park or a private place; yet this is not so with regard to places where an individual happens to be. This place must be of such a character as to give rise reasonably to these expectations of privacy. Since the passageway was located on private property, the group which met and socialized there had every expectation of freedom from governmental intrusion as to the premises and the protection of the Fourth Amendment therefore applies.

How can it be said that the record demonstrates no expectation of privacy when everything points to the contrary? The police certainly considered the basement private, probably because it appeared to be private. The only reference to customer use of the toilet facilities was

by Leon Bias, who stated that he gave permission to those who asked. Does this speak of openness? Does the closed door indicate a public invitation?

If we consider the basement as a work area adjunctive to the shoe shine parlor (per William Ellis' testimony) open to use by all working there, this does not diminish the quality of protection required. In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the defendant was a union official who shared a large room with several other union officials. State officials came there with a subpoena for certain records which were taken from DeForte and subsequently used against him in a criminal prosecution. The Supreme Court held that this common work area—and all who worked there—were clothed with Fourth Amendment protection.

It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody.

CONCLUSION

From the foregoing analysis we are thus led back to the precipital question: were the officers entitled to enter the petitioners' basement? If not, then the fact that the items seized were in open view to anyone in the basement is to no avail; if an officer invades a constitutionally protected area to secure his view, evidence thus obtained is suppressible. *United States v. Davis,* 423 F.2d 974 (7th Cir. 1970). Cf. also *McDonald v. United States,* 335 U.S. 451 (1948).

For this and all of the other reasons argued above, the petition for writ of certiorari should be granted. Further, upon review by this Court, these convictions should be reversed.

Respectfully submitted,

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APPENDIX A

Court of Appeals No. 29981

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY

STATE OF OHIO,
Appellee,

vs.

ELMER BIAS AND LEON H. BIAS,
Appellant.

JOURNAL ENTRY

(Entered January 10, 1972)

The journal entry under the O.S.J. procedure has not been complied with although entry by this Court was recorded on *February 25, 1971,* and was communicated to the parties. Therefore, under Rule 33, Appellate Rules, and Rule 8, Rules of the Court of Appeals in effect before July 1, 1971, this Court sua sponte, makes the following entry:

Judgment affirmed. In this case there was no arrest prior to the search and therefore no search incidental to arrest. *Abel v. United States,* 362 U.S. 217, 4 L. ed. 2d 668 (1960). In any event, had there been a valid arrest, the search was overbroad. Cf. *Chimel v. California,* 395 U.S. 752, 23 L. ed. 2d 685 (1969). Nor did this case fall within the hot pursuit exception to a warrantless search—*Warden v. Hayden,* 387 U.S. 294, 18 L. ed. 2d 782 (1967), nor the moving vehicle exception, *Carroll v. United States,* 267 U.S. 132, 69 L. ed. 543 (1925). It is

at least dubious whether the search could be justified under the consent exception, see *Judd v. United States*, 190 F. 2d 649 (D.C. Cir. 1951), and since we have indicated that the search was in no event incidental to the arrest, that exception is not available, *Abel v. United States*, *id.*, even if the search were limited enough to satisfy the standards of *Chimel v. California*, *id.*

Moreover, in our view in the lapse of time between police entry into the case and the search in issue there was ample time to secure a warrant and where there is time to secure a warrant it should be done. *Trupiano v. United States*, 334 U.S. 699, 92 L. ed. 1663, limited by *United States v. Rabinowitz*, 339 U.S. 56, 66, 94 L. ed. 653, 660 (1950) which was in turn limited by a case which seemed to approve *Trupiano*, *Chimel v. California*, *id.* at pages 758-760, 768, 23 L. ed. 2d at 691-692, 696-697. The absence of warrant procedure is a *per se* violation of the Fourth Amendment unless there is an applicable exception. *Katz v. United States*, 389 U.S. 347, 357, 19 L. ed. 2d 576, 585 (1967).

Nevertheless, the evidence secured in this case is not suppressible because the record shows that it was lying in plain view of anyone proceeding to the public restroom area in the defendant's business establishment. A policeman does not need a search warrant for evidence which is in plain view in a public place. A policeman is not foreclosed from entry into a public area simply because he is a policeman and no warrant is necessary for such entry. Costs to be assessed against appellant. Exc. Mandate to Issue.

/s/ JACK G. DAY
Chief Justice

DAY, C. J., WASSERMAN, J., and KRENZLER, J. Concur.

APPENDIX B

No. 75-67

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

1975 Term
To wit: March 28, 1975

STATE OF OHIO,
Appellee,

vs.

ELMER BIAS ET AL.,
Appellants.

MOTION FOR LEAVE TO APPEAL FROM
THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

No. 75-67

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

1975 Term
To wit: March 28, 1975

STATE OF OHIO,
Appellee,

vs.

ELMER BIAS ET AL.,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

No. 88886

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,
Plaintiff,

vs.

ELMER BIAS,
Defendant.

JOURNAL ENTRY

(Entered September 10, 1969)

On this day this cause came to Court, with defendant Elmer Bias, represented by counsel, for hearing of the Psychiatric Clinic report, to determine whether defendant herein is mentally ill.

Hearing was held, and the Court upon full consideration of the Psychiatric Clinic Report and other evidence, finds defendant is not eligible for commitment under the Ascherman Act, RC. 2947.25.

Thereupon, the Court overruled defendant's Motion for a New Trial.

Whereupon, defendant who on a former day of Court, having been found guilty of Rape, RC. 2905.01, as charged in the indictment, was inquired of if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore ordered and adjudged by the Court that defendant Elmer Bias be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, for an indeterminate period and that he pay the costs of this prosecution, for which execution is hereby awarded.

Further order of the Court is that Execution of Sentence is Suspended during pending of Appeal and defendant is permitted to remain on same ($2500.00) Bond during Appeal.

/s/ THOMAS J. PARRINO
Judge

APPENDIX E

No. 88886

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY, SS.

STATE OF OHIO,
Plaintiff,

vs.

LEON H. BIAS,
Defendant.

JOURNAL ENTRY

(Entered September 10, 1969)

On this day this cause came to Court, with defendant Leon H. Bias, represented by counsel, for hearing of the Psychiatric Clinic report, to determine whether defendant herein is mentally ill.

Hearing was held, and the Court upon full consideration of the Psychiatric Clinic Report and other evidence, finds defendant is not eligible for commitment under the Ascherman Act, RC. 2947.25.

Thereupon, the Court overruled defendant's Motion for a New Trial.

Whereupon, defendant who on a former day of Court, having been found guilty of Rape, RC 2905.01, as charged in the indictment, was inquired of if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said;

It is, therefore ordered and adjudged by the Court that defendant, Leon H. Bias, be imprisoned and confined in the Ohio State Reformatory, Mansfield, Ohio, for an indeterminate period and that he pay the costs of this prosecution, for which execution is hereby awarded.

Further order of the Court is that Execution of Sentence is Suspended during pending of Appeal and defendant is permitted to remain on same ($2500.00) Bond during Appeal.

/s/ THOMAS J. PARRINO
Judge